95-1439

(1)

Supreme Court, U.S.
FILED
MAR 8 1996
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

JOAN M. LAKOSKI, PH.D.,

Petitioner,

v.

THE UNIVERSITY OF TEXAS
MEDICAL BRANCH AT GALVESTON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

DAVID T. LÓPEZ,
Counsel of Record
DAVID T. LÓPEZ & ASSOC.
3900 MONTROSE BOULEVARD
HOUSTON, TEXAS 77006-4959
(713) 523-3900

34 pp

QUESTION PRESENTED

Introduction: A member of the research faculty at a medical school sued for sex discrimination under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 et seq. Suit was filed without the filing of a charge under Title VII of the 1964 Civil Rights Act, as amended, 42 U.S.C. §§ 2000e et seq. because the professor needed immediate injunctive relief to preserve her job. A jury found there was sex discrimination and judgment was entered for $250,000 in damages. The Fifth Circuit reversed and rendered, holding that because a remedy was available under Title VII there could not be an implied right of action for damages under Title IX.

Question: **Do remedies available for sex discrimination under Title VII of the 1964 Civil Rights Act preclude a suit for damages directly and exclusively under Title IX of the Education Amendments of 1972?**

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THE OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 66 F.3d 751 (5th Cir. 1995). Together with the judgment of the trial court and the order denying petition for rehearing and suggestion for rehearing en banc, the opinion is reproduced in the appendix.

JURISDICTION OF THIS COURT

Judgment sought to be reviewed was entered by the United States Court of Appeals for the Fifth Circuit on October 3, 1995. An order denying petition for rehearing was entered December 12, 1995. For the reasons set forth herein, this court should exercise its jurisdiction for review on writ of certiorari in accordance with the statutory provisions of 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves the provisions of § 901 of the Education Amendments of 1972, 20 U.S.C. § 1681(a), which, exclusive of the exceptions listed, which do not apply, provides as follows:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance...

STATEMENT OF THE CASE

Joan M. Lakoski, Ph.D., joined the faculty of the University of Texas Medical

Branch at Galveston in 1984, as a tenure track assistant professor of pharmacology. In the next six years, she obtained almost $900,000 in federal research grants, and in 1990 she and other senior faculty obtained a $5 million grant, of which $1.2 million was Dr. Lakoski's share.

Despite her success in obtaining research funding and in gaining national and international recognition, Dr. Lakoski was denied promotion in 1988, 1989 and 1990. In February, 1991, she was bitterly and personally attacked in a letter containing numerous inaccuracies and false accusations. The author served as chair of a committee which that year denied tenure to Dr. Lakoski.

Faced with having to accept an offered non-tenured position at a reduced salary, under terms not generally applied at the medical school, or of having her employment ended, Dr. Lakoski, joined by another female faculty member, sued for sex discrimination under Title IX. Dr. Lakoski requested and obtained a preliminary injunction to preserve her employment and her case was severed from what remained as a class action, but later was settled with the remaining individual plaintiff. Dr. Lakoski did not pursue a charge of discrimination with the Equal Employment Opportunity Commission, as provided by Title VII of the 1964 Civil Rights Act, because she needed the preliminary injunctive relief which she obtained to keep her job. In contrast to Title VII, which requires that a complainant provide the E.E.O.C. six months to investigate and attempt conciliation before filing suit, Title IX contains no requirement of recourse to administrative remedies.

After a trial in which Dr. Lakoski presented evidence of being stereotyped and

subjected to standards not applicable to males, the jury found that she had been subjected to sex discrimination and set damages at $250,000. Dr. Lakoski accepted a remittitur of $100,000, and judgment was entered in her favor for $150,000 plus attorney's fees.

In its brief to the Fifth Circuit, p. 12, the medical school stated: "The University does not argue that Title VII pre-empts Title IX or that Title VII is the exclusive remedy for employment discrimination." Notwithstanding this disclaimer, the Fifth Circuit reversed and rendered judgment against Dr. Lakoski holding it was persuaded that Congress intended Title VII to exclude a damage remedy under Title IX for individuals alleging employment discrimination.

Argument

I. The Fifth Circuit decision on an important federal question conflicts with relevant decisions of the Supreme Court.

This court specifically held that Title IX explicitly confers a benefit on persons discriminated against on the basis of sex. Cannon v. University of Chicago, 441 U.S. 677, 694 (1979). Three years later, this court specifically held Title IX remedies applicable to employees. North Haven Board of Education v. Bell, 456 U.S. 512, 520-21 (1982). In 1992, this court held that the implied right of action to enforce Title IX found in Cannon includes a damages remedy. Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992).

This court's holdings that Title IX provides for an implied right of action, protects employees and allows for damages were considered by the Fifth Circuit a

beguilingly simple syllogism, 66 F.3d at 754, distinguishable from this case because there was no need to address Title VII, which, if implicated at all, hovered on the distant horizon. Id.

The distinctly applicable principles set by this court cannot be discounted so blithely, particularly because, as shown, Title VII was not presented by the medical school as the exclusive remedy for sex discrimination in employment or as preempting Title IX.

In reaching its conclusion, the Fifth Circuit misapplied this court's holding in Great American Federal Savings & Loan Ass'n v. Novotny, 442 U.S. 366, 378 (1979). In Novotny, this court held that 42 U.S.C. § 1985, a remedial statute, could not be used to circumvent the Title VII administrative procedures. This court reasoned that since § 1985 did not create any right it provides a cause of action only when some otherwise defined federal right is breached by a conspiracy in a manner the statute proscribes. 442 U.S. at 376.

This court, however, established in Cannon, supra, that Title IX independently creates a right of action and is not merely a remedial statute to vindicate rights provided by some other law.

Even where Title IX protections against sex discrimination may be coextensive with the provisions of Title VII, remedies under Title IX may not be foreclosed without direct conflict with other precedent in this court.

"[The] legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes..." Johnson v.

Railway Express Agency, 421 U.S. 454, 459 (1975). "[E]ven if alternative remedies are available and their existence is relevant, but cf. Cannon,...this court has recognized that Congress has provided a variety of remedies, at times overlapping, to eradicate employment discrimination." North Haven, supra, 456 U.S. 512, 535 n. 26 (citations omitted).

The Congressional intent to permit coextensive and alternative means to redress employment discrimination was most recently demonstrated in the Civil Rights Act of 1991, which restored the viability of 42 U.S.C. § 1981 as a general prohibition of racial discrimination in employment, implying disagreement with the limitation of the use of that statute in Patterson v. McLean Credit Union, 491 U.S. 164 (1989).

The Fifth Circuit found some support for its position in Brown v. General Services Administration, 425 U.S. 820 (1976), holding that Title VII is the exclusive judicial remedy for claims of discrimination in federal employment. 425 U.S. at 835. In Brown, however, this court did not depart from the principle in Johnson, supra, allowing an employee to pursue relief under Title VII or other federal or state statutes. Rather, it held Johnson inapposite to claims by federal employees because of problems of sovereign immunity and the specific language of Title VII upon its enactment, when federal employees were not covered.

Neither consideration applies to this case.

No claim of sovereign immunity is available as a result of the Civil Rights Remedies Equalization Amendment of 1986, 42 U.S.C. § 2000d-7(a)(1).

As noted by the Fifth Circuit, 66 F.3d at 756, Title IX was enacted a few months after the Congress extended Title VII to cover state and local government employees stating in a House of Representatives report that the inclusion was not intended to abrogate the right of such government employees to sue under other laws prohibiting discrimination in employment.

The Fifth Circuit concluded that since the comment was directed at existing laws, then the Congress could not have meant it to apply to laws yet to be enacted. The opposite conclusion is much more tenable. The legislative history expresses a clear intent. Since the Congress could not be expected to comment on laws not yet enacted, it is more significant to note that when Title IX was enacted the Congress did not specify any departure from the previously announced principle of coextensive application of laws prohibiting discrimination.

The Fifth Circuit opinion raises issues cogently reasoned in Justice Powell's dissenting opinions in Cannon and North Haven. As shown below, since those opinions the Congress specifically has indicated an intent to allow both equitable and legal remedies for Title IX claims. As mentioned above, the Congress also has found no problem in the coextensive administrative and judicial remedies for race discrimination under Title VII and 42 U.S.C. § 1981.

The Fifth Circuit opinion accordingly appears to be plainly inconsistent with this court's jurisprudence and plenary review is warranted and necessary.

II. The Fifth Circuit decision also is in conflict with that of other circuits which have considered the same important matter after this court's decision in Franklin.

Amazingly, the Fifth Circuit opinion cites to decisions of other circuits for the proposition that Title IX claims should be considered under the same principles as Title VII without taking notice that in some of those cases other circuits did not have any problem with Title IX employment claims being made wholly independent of Title VII.

In Lipsett v. University of Puerto Rico, 864 F.2d 881, 896-97 (1st Cir. 1988), the First Circuit held that Title IX applied to employment-related claims of a surgical resident, who was both an employee and a student of the medical school. Interestingly, the First Circuit, in reaching that conclusion, relied on the same House report as the Fifth Circuit cited for the opposite result.

In Preston v. Commonwealth of Virginia ex rel New River Community College, 31 F.3d 203, 204-05 n. 1 (4th Cir. 1994), the court observed that it initially had not reached the question of whether a counselor employed by the community college could recover damages in addition to equitable relief under Title IX. The court noted, however, that after that initial decision, the Supreme Court had ruled in Franklin, supra, that compensatory damages were recoverable.

Indeed, after Franklin, supra, only the Fifth Circuit has held that Title IX does not provide an independent damages remedy for sex discrimination.

Even before Franklin, the Third Circuit had concluded that a damages remedy was

available under Title IX. In Pfeiffer v. Marion Center Area School District, 917 F.2d 779, 787-89 (3rd Cir. 1990), that court relied on this court's indication in Cannon, supra, that Congress intended to create remedies for Title IX comparable to those available under Title VI of the 1964 Civil Rights Act. The Third Circuit noted that in Guardians Ass'n v. Civil Service Commission of New York City, 463 U.S. 582 (1983), this court held that compensatory damages were available under Title VI for intentional discrimination.

This court granted certiorari in Franklin specifically to resolve the conflict between the Eleventh Circuit's holding that Title IX did not authorize an award of damages and the Third Circuit's opinion in Pfeiffer, which held damages were recoverable for sex discrimination in employment under Title IX. In Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 630 n. 9, this court held that a majority in Guardians had agreed that retroactive relief is available to private plaintiffs for all discrimination actionable under Title VI.

III. The Fifth Circuit opinion conflicts with public policy clearly stated by the Congress and presents serious obstacles to the implementation of that policy.

This case demonstrates that circumstances might impel an individual to seek judicial relief without first exhausting the remedies available under Title VII through the E.E.O.C.

In 1995, the E.E.O.C. reported a backlog of some 100,000 charges nationwide, as a consequence of which claimants faced long delays in the investigation of their complaints.

The medical school research professor in this case was faced with serious harm to her career and reasonably sued under a law which did not require the delay of administrative processing.

Because a similarly situated employee complaining of racial discrimination can sue under 42 U.S.C. § 1981 without first filing a charge with the E.E.O.C., the Fifth Circuit opinion creates a disparity of treatment between individuals complaining of race discrimination and those complaining of discrimination because of sex.

In abrogating the Eleventh Amendment immunity under Title IX and other statues proscribing discrimination, the Congress stated in the Civil Rights Remedies Equalization Amendment of 1986, 42 U.S.C. § 2000d-7 that "remedies (including remedies both at law and in equity) are available" for unlawful discrimination by a State to the same extent as against a private entity.

In the Civil Rights Act of 1991, the Congress provided for compensatory and punitive damages, within certain limits, for race and other unlawful employment discrimination while restoring to full effect the use of 42 U.S.C. § 1981 to seek the same damages for race discrimination.

As Justice Scalia, joined by the Chief Justice and Justice Thomas, noted in concurring in the Franklin judgment, the 1986 act, enacted after Cannon, signals that it is too late in the day to address whether a judicially implied exclusion of damages under Title IX would be appropriate.

In Franklin, this court specifically resolved the issue with respect to a case

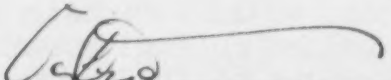
involving damages for sex discrimination in employment.

The Fifth Circuit opinion would impose unfair and disparate treatment between claimants of race and sex discrimination. It would unnecessarily force individuals needing immediate relief from sex discrimination to undertake long administrative proceedings. It is inconsistent with clear precedent of this court and with other circuit courts. It is inconsistent also with the national policy to eradicate unfair and unlawful employment discrimination through all available means.

CONCLUSION

The Fifth Circuit holding that Title VII remedies preclude a suit for damages under Title IX conflicts with relevant law of this court, conflicts with other circuit opinions, and impedes public policy on an important matter of law. Review and correction is vitally required.

Respectfully submitted,



David T. López
Attorney for Petitioner
3900 Montrose Boulevard
Houston, Texas 77006-4959
Telephone: 713-523-3900
Telecopier: 713-523-3908

Of Counsel:

DAVID T. LOPEZ & ASSOC.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

ENTERED
DEC 17 1993

MICHAEL N. MILBY, CLERK

By Deputy: s/ C Pitts

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

GALVESTON DIVISION

JOAN M. LAKOSKI, PH.D.	§	
	§	
vs.	§	CIVIL ACTION
	§	NO. G-92-385
THE UNIVERSITY OF	§	
TEXAS MEDICAL	§	
BRANCH AT GALVESTON	§	

FINAL JUDGMENT

This action came on for trial before the Court and a jury, and the issues having been duly tried and the jury having rendered its verdict, and the Plaintiff having remitted the sum of $100,000 on the verdict, the Court now enters Final Judgment as to the claims of Plaintiff Joan M. Lakoski, Ph.D.

Defendant's motion for a new trial is **DENIED**. It is **ORDERED** that Plaintiff Joan M. Lakoski, Ph.D., recover of the Defendant, The University of Texas Medical Branch at Galveston, the sum of **$150,000.00** in damages, with interest thereon at the rate of 3.40 per cent per annum, as provided by law.

It is further **ORDERED** that the Plaintiff, Joan M. Lakoski, Ph.D., and her attorneys, David T. Lopez and David T. Lopez & Assoc., Attorneys, recover of the Defendant, The University of Texas Medical Branch at Galveston, the sum of **$110,288.01** as attorney's fees, expenses, and costs, with interest thereon at the rate of 3.40 per cent per annum, as provided by law.

It is further **ORDERED** that the Defendant, The University of Texas Medical Branch at Galveston, its agents, employees, attorneys and persons acting in concert with it attach a copy of the Final Judgment in this case to each copy in their records of the letter by Kenneth Johnson dated February 25, 1991.

All other claims by Dr. Lakoski are **DISMISSED**, and any relief not specifically granted herein is **DENIED**. This judgment does not affect the claims of Plaintiff June Z. Kendall or of any asserted class.

THIS IS A FINAL JUDGMENT.

IT IS SO ORDERED.

Done this 17th day of December, 1993, at Galveston, Texas.

s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

U.S. COURT OF APPEALS
FILED
OCT 03, 1995
CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 94-60010

JOAN M. LAKOSKI, PH.D., ET AL.,

Plaintiffs,

JOAN M. LAKOSKI, PH.D.,

Plaintiff-Appellee,
Cross-Appellant,

versus

THOMAS M. JAMES, M.D., ET AL.,

Defendants,

THE UNIVERSITY OF TEXAS
MEDICAL BRANCH AT GALVESTON,

Defendant-Appellant,
Cross-Appellee.

Appeals from the United States District Court for the Southern District of Texas

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Before HIGGINBOTHAM, SMITH and STEWART, Circuit Judges.

HIGGINBOTHAM, Circuit Judge:

Rather than seek redress under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., Dr. Joan Lakoski sued the University of Texas Medical Branch at Galveston under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq., and 42 U.S.C. § 1983, alleging that the University intentionally discriminated against her on the basis of sex in denying her tenure. After a jury trial, the district court granted judgment to Lakoski and awarded her $150,000 in damages, plus attorneys' fees. The University appeals, claiming that Title IX does not provide a private right of action for employment discrimination either directly or derivatively through 42 U.S.C. § 1983. Dr. Lakoski cross-appeals the district court's remittitur of damages and fee award. We have jurisdiction over this timely appeal from a final judgment. 28 U.S.C. § 1291. We are persuaded that Title VII afforded Dr. Lakoski the exclusive means of relief, and we reverse and render judgment for the University.

I.

In 1984, Dr. Lakoski joined the University's faculty as a tenure-track assistant professor in the Department of Pharmacology. Under its tenure policy, the University reviewed junior faculty members for tenure by the beginning of their eighth year at the latest. Lakoski sought and was denied promotion three times: in 1988, 1989, and 1990. In February 1991, the department's tenure committee recommended that Dr. Lakoski not be considered for tenure in the future. The University offered Lakoski another position with a significant salary increase, but she rejected the offer. Cary Cooper, the departmental chairman, later informed Dr. Lakoski that her 1991-1992 appointment was her last at the University.

Less than a month before her final appointment was to expire, Dr. Lakoski sued the University and three University officials, alleging that the denial of tenure and her termination constituted intentional sex discrimination in violation of Title IX, 42 U.S.C. § 1983, and state tort law. Although Lakoski's complaint was not clear on this point, her § 1983 claims were evidently based upon both the Fourteenth Amendment and Title IX. Significantly, Dr. Lakoski did not file a charge with the Equal Employment Opportunity Commission, nor did she plead that the University violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

Upon filing the suit, Dr. Lakoski sought a preliminary injunction preventing her scheduled termination. Under an agreement with the University, Dr. Lakoski remained on the faculty pending the outcome of the trial. She later accepted a tenure-track position at Pennsylvania State University.

The defendants moved to dismiss Lakoski's suit. The individual defendants claimed qualified immunity and the University argued that there was no implied private right of action under Title IX for damages for employment discrimination. A magistrate judge rejected both contentions but dismissed the § 1983 claims against the University, noting that although the § 1983 claims appear to be asserted only against the individual defendants, "insofar as [Lakoski] asserts a § 1983 cause of action against UTMB, that claim must be dismissed" because of the Eleventh Amendment. The magistrate judge did not distinguish between a § 1983 claim based upon the Fourteenth Amendment and a § 1983 claim based upon Title IX. The district court adopted the magistrate's recommendations and dismissed Lakoski's § 1983 claims without elaboration.

At trial, Lakoski presented evidence suggesting that the University, in evaluating her for promotion and tenure, employed standards by which male faculty members were not judged. The University countered that it denied Lakoski tenure because of the paucity of her peer-reviewed articles and her inability to sustain collegial relationships in her department.

At the close of Lakoski's case, the district court dismissed all the claims against the individual defendants, leaving only the University to defend the Title IX claim and, apparently, the § 1983 claim based upon Title IX. Though not entirely clear, the record indicates that the district court presented these two claims to the jury as a joint claim, even though the earlier dismissal of Lakoski's § 1983 claims had not explained whether the § 1983 claim asserting rights secured by Title IX was included in the order of dismissal. The jury found that the University intentionally discriminated against Dr. Lakoski on the basis of sex and awarded her damages of $250,000. The court later reduced the damages to $150,000 plus attorneys' fees. The University now appeals the resulting judgment, and Dr. Lakoski appeals the remittitur and fee award.

II.

Critical to our resolution of this case is the fact that, although Dr. Lakoski possessed a colorable claim of employment discrimination in violation of Title VII, she chose not to pursue the remedy made available by Title VII. Title VII provides an administrative procedure in which an aggrieved individual must first pursue administrative remedies before seeking judicial relief. See 42 U.S.C. § 2000e-5. Dr. Lakoski chose to circumvent this procedure and immediately

assert her rights under Title IX both directly and derivatively through 42 U.S.C. § 1983.

We are not persuaded that Congress intended that Title IX offer a bypass of the remedial process of Title VII. We hold that Title VII provides the exclusive remedy for individuals alleging employment discrimination on the basis of sex in federally funded educational institutions. We limit our holding to individuals seeking money damages under Title IX directly or derivatively through § 1983 for employment practices for which Title VII provides a remedy, expressing no opinion whether Title VII excludes suits seeking only declaratory or injunctive relief.

III.

Dr. Lakoski argues that Cannon v. University of Chicago, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979), North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982), and Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992), sum to an implied private right of action for damages under Title IX for employment discrimination. Cannon held that a woman denied admission to a federally funded school because of her sex enjoys an implied private right of action under Title IX. 441 U.S. at 709. Bell upheld federal regulations issued under Title IX prohibiting employment discrimination on the basis of sex at federally funded educational institutions. 456 U.S. at 530. Finally, Franklin held that a student harassed by her teacher may seek money damages in a private suit for the violation of Title IX. 503 U.S. at 63.

We must disagree with Dr. Lakoski's jurisprudential arithmetic. Unlike Dr.

Lakoski's suit, neither Cannon nor Bell nor Franklin required the Court to address the relationship between Title VII and Title IX. Both Cannon and Franklin involved claims of prospective or current students at federally funded educational institutions; neither involved a claim of employment discrimination by an employee of those schools. Bell addressed Title IX's prohibition of employment discrimination in a challenge to the validity of administrative regulations terminating federal funding of educational institutions that discriminated on the basis of sex in their employment practices. Bell was not a claim by an individual for money damages for discrimination. In Bell, unlike here, a private remedy for aggrieved employees under Title VII did not affect, must less undermine, the validity of regulations for terminating federal funding. 503 U.S. at 535 n.26. In short, Cannon, Bell, and Franklin all presented legal questions in which Title VII hovered on the distant horizon, if it was implicated at all. Here, Title VII occupies center stage.

Given the availability of a private remedy under Title VII for aggrieved employees, we are unwilling to follow Dr. Lakoski's beguilingly simple syllogism that Cannon, Bell, and Franklin all add up to an implied private right of action for damages under Title IX for employment discrimination. Doing so would disrupt a carefully balanced remedial scheme for redressing employment discrimination by employers such as the University of Texas Medical Branch. We are unwilling to do such violence to the congressionally mandated procedures of Title VII. We hold that the district court erred in

submitting Dr. Lakoski's Title IX claim for damages to the jury.[1]

IV.

Confusing both Lakoski and the University, the district court submitted to the jury Lakoski's § 1983 claim based upon Title IX as well as her Title IX claim, at least the record so suggests. If true, the district court erred.

A.

Section 1983 encompasses claims based upon rights secured by federal statutes as well as by the United States Constitution. Maine v. Thiboutot, 448 U.S. 1, 4, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980). However, a statute may provide "remedial devices ... sufficiently comprehensive ... to demonstrate congressional intent to preclude the remedy of suits under § 1983." Middlesex Cty. Sewerage Auth. v. National Sea Clammers Ass'n., 453 U.S. 1, 20, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981).

To determine whether Congress intended to foreclose the § 1983 remedy for rights created by a federal statute, courts look to the remedial measures provided by the statute itself. See, e.g., Alexander v. Chicago Park Dist., 773 F.2d 850, 856 (7th Cir. 1985) ("Since Title VI provides its own remedial scheme, we hold that private actions based on Title VI may not be brought under § 1983."),

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[1] See also Howard v. Board of Educ. of Sycamore Community Unit Sch. Dist. No. 427, 893 F.Supp. 808, 815 (N.D. Ill. 1995) (holding that Title VII pre-empts Title IX employment discrimination action).

cert. denied, 475 U.S. 1095, 106 S.Ct. 1492, 89 L.Ed.2d 894 (1986).

Title IX provides limited remedies for victims of employment discrimination. Termination of federal funding is the sole remedy expressly available for violations of Title IX. See 42 U.S.C. § 1682; 34 C.F.R. § 106.71; see also North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 552, 102 S.Ct. 1912, 1934, 72 L.Ed.2d 299 (1982) (Powell, J., dissenting) (noting that Title IX "contains only one extreme remedy, fund termination"); Dougherty Cty. School System v. Harris, 622 F.2d 735, 736 (5th Cir. 1980) (noting that termination of funding is Title IX's primary sanction"), cert. granted and judgment vacated, 456 U.S. 986, 102 S.Ct. 2264, 73 L.Ed.2d 1280 (1982). We cannot say that Title IX provides a remedial scheme sufficiently comprehensive to indicate by itself that Congress intended to foreclose § 1983 suits based upon rights created by Title IX.

We ought not, however, confine our inquiry into congressional intent to the remedies afforded by Title IX. Congress chose a variety of tools to remedy employment discrimination. Title IX's prohibition of sex discrimination in federally funded educational institutions is part of a larger federal legislative scheme designed to protect individuals from employment discrimination on the basis of sex. Compare 20 U.S.C. § 1681 et esq. (Title IX) with 42 U.S.C. § 2000e et seq. (Title VII) and 29 U.S.C. § 206(d) (Equal Pay Act). To focus exclusively on Title IX's remedies would ignore this larger federal scheme and the remedies provided by it, particularly those of Title VII.

B.

We are persuaded that Congress intended Title VII to exclude a damage remedy under Title IX for individuals alleging employment discrimination. In Great American Federal Savings & Loan Ass'n v. Novotny, 442 U.S. 366, 378, 99 S.Ct. 2345, 60 L.Ed.2d 957 (1979), the Court held that Title VII pre-empts § 1985 actions alleging violations of Title VII rights. Confronting a situation much like the one before us, the Court noted that "[i]f a violation of Title VII could be asserted through § 1985(3), a complainant could avoid most if not all of [Title VII's] detailed and specific provisions of the law [and] .... could completely bypass the administrative process, which plays such a crucial role in the scheme established by Congress in Title VII." Id. at 375, 376. In addition, the Court in Brown v. General Servs. Admin., 425 U.S. 820, 835, 96 S.Ct. 1961, 48 L.Ed.2d 402 (1976), held that Title VII provides the exclusive judicial remedy for federal employees' claims of employment discrimination. In Brown, the Court expressly noted that "[i]n a variety of contexts the Court has held that a precisely drawn, detailed statute pre-empts more general remedies." Id. at 834.

Drawing upon this body of Supreme Court precedent, we held in Irby v. Sullivan, 737 F.2d 1418, 1428 (5th Cir. 1984), that Title VII is the exclusive remedy for violations of rights created by Title VII itself. Following Novotny, we concluded that "unimpaired effectiveness can be given to the plan put together by Congress in Title VII only by holding that deprivation of a right created by Title VII cannot be the basis for a cause of action under § 1983." Id. (citation, internal quotation marks, and alterations omitted); see also Johnston v. Harris Cty.

Flood Control Dist., 869 F.2d 1565, 1574 (5th Cir. 1989) (noting that "a violation of § 704(a) of Title VII, alone, will not constitute an underlying statutory violation for purposes of imposing liability under § 1983"), cert. denied, 493 U.S. 1019, 110 S.Ct. 1019, 107 L.Ed.2d 738 (1990). Other circuits have agreed, holding that Title VII's comprehensive remedial scheme precludes § 1983 suits based upon violations of Title VII rights. See Day v. Wayne Cty. Bd. of Auditors, 749 F.2d 1199, 1204 (6th Cir. 1984); Alexander, 773 F.2d at 856; Allen v. Denver Pub. Sch. Bd., 928 F.2d 978, 982 (10th Cir. 1991). Indeed, the "precisely drawn, detailed enforcement structure" of Title VII provides the exclusive remedy for Title VII rights. Polson v. Davis, 895 F.2d 705, 710 (10th Cir. 1990).

We recognize that the legislative history of the Equal Employment Opportunity Act of 1972, which extended Title VII to state and local governmental employees such as Dr. Lakoski, discloses that Congress did not intend Title VII to preempt § 1983 claims based upon rights already held by individuals, such as constitutional rights. The House report accompanying the Act stated:

> In establishing the applicability of Title VII to State and local employees, the Committee wishes to emphasize that the individual's right to file a civil action in his own behalf, pursuant to the Civil Rights Act of 1870 and 1871, 42 U.S.C. §§ 1981 and 1983, is in no way affected.... Title VII was envisioned as an independent statutory authority meant to provide an aggrieved individual with an additional remedy to redress employment discrimination. Two recent court

> decisions have affirmed this Committee's belief that the remedies available to the individual under Title VII are co-extensive with the individual's right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. § 1981, and that the two procedures augment each other and are not mutually exclusive. The bill, therefore, by extending jurisdiction to State and local government employees does not affect existing rights that such individuals have already been granted by previous legislation.

H.R.Rep. No. 238, 92d Cong., 1st Sess. (1971), reprinted in 1972 U.S.C.C.A.N. 2137, 2154.[2]

However, that Congress in extending Title VII's protective umbrella to state and local governmental employees did not intend Title VII to preempt § 1983 suits based upon "rights that such individuals have already been granted" -- such as constitutional rights -- says nothing about Congress' intent regarding Title IX. Title IX did not exist

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[2] The minority report objected to the Act on the ground that it did not make Title VII the exclusive remedy for employment discrimination, noting that "[d]espite the enactment of Title VII of the Civil Rights Act, charges of discriminatory employment conditions may still be brought under prior existing federal statutes such as the National Labor Relations Act and the Civil Rights Act of 1866." H.R. Rep. No. 238, 92d Cong., 1st Sess. (1971), reprinted in 1972 U.S.C.C.A.N. 2137, 2175.

at the time that the House report was drafted nor at the time that the Equal Employment Opportunity Act of 1972 was enacted. Reviewing the House Report, the Sixth Circuit in Day v. Wayne County Bd. of Auditors rejected the idea that Congress intended, outside the narrow confines of conduct that violated both Title VII and other, pre-existing federal rights, to permit individuals to circumvent Title VII's procedures:

> We believed the [House] committee referred to the right to sue under § 1983 for constitutional violations or for violation of statutes which protected such employees before the enactment of the 1972 amendments. Claims under these existing laws were not affected; they could be pursued along with claims under Title VII for the purpose of obtaining additional remedies. However, we do not read this language as expressing an intent that where employer conduct violates only Title VII, which created new rights and remedies for public employees, an aggrieved employee may sue under both Title VII and § 1983.

749 F.2d at 1204-05.

Congress enacted Title IX only months after extending Title VII to state and local governmental employees. That Congress intended to create a bypass of Title VII's administrative procedures so soon after its extension to state and local governmental employees is an extraordinary proposition. Title IX's similarity to Title VII belies the

contention. Although phrased differently,[3] both Title VII and Title IX protect individuals from employment discrimination on the basis of sex. Any difference between their prohibitions of sex discrimination is not compelled by statutory language.

The legislative history of the Education Amendment of 1972 also suggests that the Title IX right to be free from sex discrimination in employment is no different from the Title VII right. At the time that Congress began to consider the legislation that would eventually become the Education Amendments of 1972, Title VII exempted educational institutions from its coverage. As a consequence, the original House bill proposed amending Title VII of the Civil Rights Act of 1964 to remove the exemption for educational institutions. See H.R. 7248, 92d Cong., 1st Sess. § 1006 (1971). The House Report accompanying the Education Amendments of 1972 explained:

> One of the single most important pieces of legislation which has

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[3] Compare 42 U.S.C. § 2000e-2(a)(1) (providing that it shall be unlawful for employers, which include state and local governments, "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... sex") with 20 U.S.C. § 1681(a) (providing that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance").

> prompted the cause of equal employment opportunity is Title VII of the Civil Rights Act of 1964 which prohibits discrimination in private employment based on race, color, religion, sex or national origin. The Act prohibits any practice by employers which would tend to discriminate against an employee or prospective employee on the basis of that person's race, religion, sex or national origin. Title VII, however, specifically excludes educational institutions from its terms. The title would remove that exemption and bring those in education under the equal employment provision.

H.R.Rep. No. 554, 92d Cong., 1st Sess. (1971), reprinted in 1972 U.S.C.C.A.N. 2462, 2512. The passage of the Equal Employment Opportunity Act of 1972, which removed Title VII's exemption for educational institutions as well as extending Title VII's coverage to state and local government employees, obviated the need for the Education Amendments to close the loophole in Title VII. The final bill enacted by Congress omitted the language amending Title VII but left the provision prohibiting sex discrimination in federally funded educational institutions.

The House report's reference to Title VII suggests that, in enacting Title IX, Congress chose two remedies for the same right, not two rights addressing the same problem. Title VII provided individuals with administrative and judicial redress for employment discrimination, while Title IX empowered federal agencies that provided funds to educational institutions to terminate that funding upon the finding of employment discrimination. In other words, Con-

gress intended to bolster the enforcement of the pre-existing Title VII prohibition of sex discrimination in federally funded educational institutions; Congress did not intend Title IX to create a mechanism by which individuals could circumvent the pre-existing Title VII remedies.

Administrative regulations also suggest that Title IX's proscription of sex discrimination, when applied in the employment context, does not differ from Title VII's. Department of Justice regulations governing procedures for investigating charges of employment discrimination brought under Title IX provide that "[i]n any investigation, compliance review, hearing or other proceeding, agencies shall consider Title VII case law and EEOC Guidelines, 29 CFR parts 1604 through 1607, unless inapplicable, in determining whether a recipient of Federal financial assistance has engaged in an unlawful employment practice." 28 C.F.R. § 42.604 (1994). The Equal Employment Opportunity Commission's regulations adopt an identical view of Title IX's scope. See 29 C.F.R. § 1691.4 (1994).[4]

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[4] Regulations promulgated by agencies charged with enforcing Title IX provide that "[t]he obligations imposed by [Title IX] are independent of, and do not alter, obligations not to discriminate on the basis of sex imposed by ... Title VII of the Civil Rights Act of 1964." See 34 C.F.R. § 106.6(a); see also 7 C.F.R. § 15a.5(a); 10 C.F.R. § 1040.24(a); 45 C.F.R. § 86.6(a). However, the reference to Title IX as "independent of" Title VII indicates that the administrative finding of discrimination under Title VII is not a prerequisite to such a finding under Title IX. It does not indicate the entirely

Finally, other circuit courts have acknowledged that the prohibitions of discrimination on the basis of sex of Title IX and Title VII are the same. See Preston v. Commonwealth of Va. ex rel. New River Community College, 31 F.3d 203, 206 (4th Cir. 1994) (holding that Title VII principles govern claims of employment discrimination under Title IX); Roberts v. Colorado State Bd. of Agric., 998 F.2d 824, 832 (10th Cir.), cert denied, 114 S.Ct. 580, 126 L.Ed.2d 478 (1993); Lipsett v. University of Puerto Rico, 864 F.2d 881, 897 (1st Cir. 1988); Mabry v. State Bd. of Community Colleges & Occupational Educ., 813 F.2d 311 (10th Cir.), cert. denied, 484 U.S. 849, 108 S.Ct. 148, 98 L.Ed.2d 104 (1987).[5]

Given this compelling evidence that Title IX prohibits the same employment practices proscribed by Title VII, we hold that

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different proposition, which is at issue in this case, that Title IX provides an alternative remedy for unlawful employment practices already prohibited by Title VII.

[5] Contrary to these decisions from other circuits, we stated in Chance v. Rice Univ., 984 F.2d 151, 153 (5th Cir.), reh'g denied, 989 F.2d 179 (5th Cir. 1993), that Title IX claims of employment discrimination are properly analyzed under the intentional discrimination standard of Title VI, not Title VII. However, we later retreated from our statement in Chance that Title VI principles govern Title IX claims of employment discrimination. Chance v. Rice Univ., 989 F.2d 179, 180 (5th Cir. 1993) (holding that "we therefore need not decide whether [Chance's] claim should have been analyzed under [the Title VII] standard").

individuals seeking money damages for employment discrimination on the basis of sex in federally funded educational institutions may not assert Title IX either directly or derivatively through § 1983.

V.

Title VII offers valuable rights to victims of employment discrimination. We are not persuaded that Congress offered Title IX to employees of federally funded educational institutions so as to provide a bypass to Title VII's administrative procedures. We REVERSE the judgment of the district court and RENDER judgment for the University. The cross-appeal is DISMISSED as moot.

U.S. COURT OF APPEALS
FILED
DEC 12, 1995
CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60010

JOAN M. LAKOSKI, PH.D., ET AL.,

Plaintiffs,

LAKOSKI, PH.D.,

Plaintiff-Appellee,
Cross-Appellant,

versus

THOMAS M. JAMES, M.D., ET AL.,

Defendants,

THE UNIVERSITY OF TEXAS
MEDICAL BRANCH AT GALVESTON,

Defendant-Appellant,
Cross-Appellee.

Appeal from the United States District
Court for the Southern District of Texas

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 10/03/95, 5 Cir., ___, ___ F.3d ___)

Before HIGGINBOTHAM, SMITH and STEWART, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc, is also DENIED.

ENTERED FOR THE COURT:

s/ Patrick E. Higginbotham
United States Circuit Judge

Judge Emilio M. Garza did not participate in the consideration of the suggestion for rehearing en banc.

REHG-4
Rev. 1/4/95

Supreme Court, U.S.
FILED
MAY 17 1996
CLERK

NO. 95-1439

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

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JOAN M. LAKOSKI, PH.D.,
Petitioner

v.

THE UNIVERSITY OF TEXAS
MEDICAL BRANCH AT GALVESTON,
Respondent

****

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

****

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DAN MORALES
Attorney General of Texas

JORGE VEGA
First Assistant Attorney General

LAQUITA A. HAMILTON
Deputy Attorney General

TONI HUNTER
Chief, General Litigation Division

JAMES C. TODD
Assistant Attorney General
General Litigation Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2120

Counsel for Respondent

20 pp

QUESTION PRESENTED FOR REVIEW

May an employee of a federally assisted educational institution bypass the deadlines and limitations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, in order to sue soley under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, for damages for sex discrimination in employment?

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NO. 95-1439

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

****

JOAN M. LAKOSKI, PH.D.,
Petitioner

v.

THE UNIVERSITY OF TEXAS
MEDICAL BRANCH AT GALVESTON,
Respondent

****

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

****

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*

STATEMENT OF THE CASE

This is an action for damages for alleged intentional sex discrimination in employment. Petitioner Joan Lakoski was a tenure-track assistant professor and member of the faculty of the Pharmacology Department at the University of Texas Medical Branch at Galveston. After being rejected for the third time for promotion and tenure, she sued the University and three officials, alleging that denial of promotion and tenure and termination from employment were acts of intentional gender

discrimination in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* ("Title IX"); the Civil Rights Act of 1871, 42 U.S.C. § 1983; and state tort law. Lakoski did not file an EEOC charge of discrimination, nor did she plead Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"), as a ground of recovery. Her claim of sex discrimination against the University is grounded solely on Title IX.

At the conclusion of her post doctoral work at Yale, where she had been highly productive in the lab of her mentor, Lakoski joined the University staff as a tenure-track assistant professor for the Department of Pharmacology in 1984 on a nine-year system. Under the University's tenure system, Lakoski was entitled to a mandatory review for tenure by the beginning of her eighth year, and if she failed to meet the University's criteria for tenure, her appointment with the University would not be renewed. Lakoski's so-called "up-or-out year" would have been in 1992, which would have been her eighth year with the University.

Prior to 1991, Lakoski was twice considered for promotion to associate professor and unanimously turned down because of insufficient publication of quality scholarly articles and inappropriate treatment of colleagues. In February 1991, she was again reviewed for promotion, and again the departmental Appointment, Promotion, and Tenure committee unanimously recommended that she not be promoted, and further recommended that she not be considered for tenure.

The departmental chairman concurred with the committee. Thereafter, he advised Lakoski that unless a transfer to another department at UTMB could be arranged, her next appointment would be terminal. As a result of her chairman's and dean's efforts, the UTMB Psychiatry Department offered Lakoski a position with promotion to associate professor and early consideration for tenure. But she refused this offer, and was

subsequently notified that her appointment for 1991-92 was terminal.

Plaintiff subsequently took a position at Pennsylvania State University, as a tenure-track associate professor at a somewhat lower salary than she had been offered by the UTMB Psychiatry Department. At the time of trial, Lakoski was a member of the faculty at that university.

Lakoski originally sought reinstatement, along with compensatory and punitive damages, but, having found a faculty position at another university by the time of trial, she abandoned her claim for reinstatement and sought only damages. At the close of the evidence, the trial court dismissed all claims against all defendants except the Title IX claim against UTMB for actual damages[1] and injunctive relief. The jury found for Lakoski and awarded her $250,000. Overruling UTMB's motions for judgment as a matter of law and/or for new trial, but granting remittitur, the trial court awarded Lakoski judgment for $150,000 in damages, attorney fees of $110,000, and a permanent injunction directing UTMB to append copies of the court's judgment to specific documents in Lakoski's university record.

On appeal, the U.S. Court of Appeals for the Fifth Circuit reversed and rendered judgment for the respondent herein. *Lakoski v. James*, 66 F.3d 751 (5th Cir. 1995); Pet. Appendix (App.). The Fifth Circuit, "not persuaded that Congress intended that Title IX offer a bypass of the remedial process of

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[1] The trial court submitted to the jury the issues of damages for backpay, future lost earnings, and mental anguish. The verdict form did not differentiate between the amount for backpay and the amount for mental anguish. However, in its remittitur, the court indicated that Lakoski requested $150,000 for backpay, and $100,000 for mental anguish. The court felt that both amounts were excessive in light of the evidence, and reduced the amount for backpay to $100,000 and the amount for mental anguish to $50,000. Lakoski also requested $147,164 in fees, and $8,165.25 in costs. The court reduced fees and costs to $110,288 combined.

Title VII," held "that Title VII provides the exclusive remedy for individuals alleging employment discrimination on the basis of sex in federally funded educational institutions." *Id.* at 66 F.3d 753. However, the court "limit[ed its] holding to individuals seeking money damages under Title IX . . . for employment practices for which Title VII provides the remedy . . ." *Id.*

From that decision, Lakoski petitions for the Court's review.

ARGUMENTS FOR DENYING THE PETITION

I. The Fifth Circuit Holding In This Case Does Not Have A Wide Application.

Because Lakoski did not file suit under Title VII, having missed the deadline for filing an EEOC charge, the Fifth Circuit's holding that she could not maintain a Title IX action for damages for employment discrimination had the effect of leaving her without a remedy. But very few litigants are likely to find themselves in that predicament.

The reality is that only a very narrow class of potential plaintiffs would benefit from reversal of the Fifth Circuit decision in this case. That is, the only putative victim of sex discrimination by a federally assisted educational program whose ability to litigate a claim for damages could be impacted by the *Lakoski* decision would be an employee who (1) fails to comply with a prerequisite for suit under Title VII, and/or (2) seeks relief in excess of the limits imposed by Title VII. Not many prospective plaintiffs are likely to fall into either category.

For a quarter of century, postsecondary education personnel have had access to Title VII for employment discrimination. *North Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 524, 102 S.Ct. 1912, 1919 (1982); *Lakoski v. James, supra*, 66 F.3d at 756. It seems highly improbable that any academic employee who is

aware of her rights under Title IX would be at the same time unaware of her remedies under Title VII. Once she perceives herself to have suffered discrimination on the basis of her sex, the employee has at least six months in which to decide whether to invoke the Title VII procedures by filing a charge of discrimination. 42 U.S.C. § 2000e-5(e)(1). In most states, as in Texas, the employee has 300 days. *Id.*; *Griffin v. City of Dallas*, 26 F.3d 610, 612-613 (5th Cir. 1994). Lakoski was the rare employee who, having let ten months elapse without exercising her Title VII options, decided within the next fourteen months (before the expiration of the Title IX limitations period) to litigate the employment decision to which she objected.

The aberrance of Lakoski's situation is well illustrated by authorities on which she relies in her petition. Although the amendments creating Title IX and extending Title VII to states and universities have been on the books since 1972, the petitioner could cite only three circuit cases, other than Lakoski's own, even arguably addressing the issue of parallel Title VII and Title IX remedies for employment discrimination. As shown in III below, only one of those three was a bona fide employment case and in it the plaintiff sued under *both* Title VII and Title IX. That, of course, is what Lakoski neglected to do. In short, Lakoski's dilemma is simply not likely to arise with much frequency.

The second category of affected individuals, victims of sex discrimination by educational employers whose damages exceed the Title VII limits, does not appear to be a much larger group. As a policy matter, there is no evidence in the record of this case that educational employees are more likely to face that shortfall than any others. Nor is there any indication in the relevant legislative history that Congress was more concerned that employees of federally assisted educational programs be fully compensated for sex discrimination than it was with respect to other classes of employees.

At any rate, Lakoski's case does not pose this question for the Court. Even without the remittitur, the damages and attorneys' fees awarded to Lakoski fell well within the Title VII limits. 42 U.S.C. §§ 1981a(b)(3)(D), 2000e-5(g). Because Title VII places no limits on backpay and attorneys fees, *id.*, the Fifth Circuit decision in *Lakoski* would preclude a measure of relief only to those victims of employment sex discrimination in federally funded educational programs whose anguish, pain, and future pecuniary loss exceed $300,000 each. A computer search by respondent's counsel disclosed no Title IX employment case in which such an amount was awarded in damages. Nor has Lakoski cited any.

It follows from all the foregoing that any ruling by this Court in this case will provide guidance for only a small handful of litigants. Ironically, however, if the Court grants *certiorari* and reverses the Fifth Circuit in this case, it may generate much wider applicability than the decision would otherwise have. As illustrated by cases such as *Preston* and *Mabry*, examined in III below, plaintiffs alleging sex discrimination by educational employers have until now tended to sue under Title VII, either exclusively or in conjunction with Title IX. If this Court adopts Lakoski's position, many more plaintiffs can be expected to ignore Title VII altogether, bypassing its tighter timetable and stricter limits on relief, to sue under Title IX alone. Educational employers, then, in contrast to all other employers, will face potentially unlimited liability and greater uncertainty in controversies over alleged sex discrimination in employment.

II. The Fifth Circuit Decision In This Case Does Not Conflict With Any Decision of the Supreme Court.

Lakoski argues that the Fifth Circuit's holding in her case conflicts with three decisions of this Court -- not with any of the decisions by itself but with the three in combination. Petition for Writ of Certiorari ("Pet.") at 3-6, discussing *Cannon v. University of Chicago*, 441 U.S. 675, 99 S.Ct. 1946 (1979); *North Haven Board of Education v. Bell*, 456 U.S. 512, 102

S.Ct. 1912 (1982); *Franklin v. Gwinnett County Schools*, 503 U.S. 60, 112 S.Ct. 1028 (1992). However, the *Lakoski* result is neither precluded nor compelled by the foregoing decisions. Each on its own merits is distinguishable, and the whole is not greater than the sum of its parts.

Neither singly nor in combination did the three cited cases call upon this Court to determine the respective scopes of Title VII and IX in the context of damages for employment discrimination. In *Cannon*, the plaintiff sought admission to medical school. *Id.*, 441 U.S. at 680, 99 S.Ct. at 1949. Thus, the case provides no guidance for employment suits. Neither the Fifth Circuit nor the respondent has ever denied that the full panoply of Title IX rights and remedies, including damages, is applicable to a controversy between a past, present, or prospective *student* and a federally funded educational institution. The same distinction applies to *Franklin, supra*, in which a student sued a school district for damages due to alleged sexual harassment by a teacher.

North Haven unquestionably applies Title IX to employment, but not for purposes of a private right of action, much less a claim for damages. As explained in the opening words of Justice Blackmun's opinion: "At issue here is the *validity of regulations* promulgated by the Department of Education pursuant to Title IX . . ." *Id.* at 456 U.S. *North Haven* 514, 102 S.Ct. 1914 (emphasis added). Neither in nor in any other case has this Court held that the scope of the private right of action inferred in *Cannon* (for which a damages remedy was implied in *Franklin*) is coextensive with that of the Department of Education's regulatory authority under Title IX. While the two overlap, they are nevertheless distinct.

This Court recognized in *Cannon* that "Title IX . . . sought to accomplish two related, *but nevertheless somewhat different*, objectives." 441 U.S. 704, 99 S.Ct. 1961 (emphasis original). "First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide

individual citizens effective protection against those practices." *Id.* It is the first purpose above that is served by the funds-termination provision and related regulations-writing authority examined in *North Haven*.[2] *Cannon, supra*, at 441 U.S. 704, 99 S.Ct. 1961; *North Haven, supra*, at 456 U.S. 536-537, 102 S.Ct. 1926.

The existence of adequate remedies through another federal statute is irrelevant to the first purpose, that served by the regulations in *North Haven*. That is, Congress and the Department of Education do not want federal funds to subsidize any form of sex discrimination in education, regardless of what alternative remedies might be available.

The existence of an adequate alternative judicial remedy is highly relevant, however, to the second purpose: insuring that each individual intended beneficiary is protected. In *Cannon*, this Court implied a private right of action for a woman denied admission to medical school, because the only other available "remedy," termination of federal funds to the entire school, was inadequate to serve the second purpose of protecting the individual. *Id.* at 441 U.S. 705-706, 99 S.Ct. 1962. Similarly, in *Franklin*, this Court concluded that the insufficiency of proposed alternatives (backpay and prospective injunction) to serve the second purpose of Title IX made a damage remedy necessary for a sexually harassed student. *Id.* at 503 U.S. 76, 112 S.Ct. 1038.

Thus, *North Haven's* conclusion that federal Title IX regulations may include employment does not answer the question of whether an individual's private right of action under Title IX includes a claim for damages for employment discrimination.[3] With respect to the Title IX private right of

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[2] None of the Department of Education regulations in question purport to address the scope of a protected individual's private right of action.

[3] Note that in *North Haven*, the "[p]etitioners contend[ed] that Title IX was not meant to reach the employment practices of educational institutions."

action, neither *Cannon* nor *Franklin* dealt with a situation in which the second purpose of Title IX was adequately and appropriately served through pre-existing remedies under another federal statute. And none of the three decisions authorize a Title IX damages remedy when "[d]oing so would disrupt a carefully balanced remedial scheme for redressing" the type of discrimination challenged by the plaintiff in question. *Lakoski, supra*, at 66 F.3d 754.

III. The Fifth Circuit Decision In This Case Does Not Conflict With That Of Any Other Circuit.

A. The Petitioner Has Failed To Identify A Genuine Conflict.

Lakoski does not, and cannot, offer a single case in which another circuit has reached a result directly contrary to the Fifth Circuit's holding in this case. In none of the cases cited by the petitioner in part II of the Argument section of her petition would the reasoning or holding in *Lakoski* compel a different outcome. The most that Lakoski can assert is that "other circuits *did not have any problem with* Title IX employment claims being made wholly independent of Title VII." Pet. at 7 (emphasis added).

One of the three decisions relied upon by Lakoski did not concern employment discrimination at all. The plaintiff in *Pfeiffer* was a high school student who challenged her dismissal from a school organization. *Pfeiffer v. Marion Center Area School District*, 917 F.2d 779, 780-783 (3rd Cir. 1990). As Title VII provides no conceivable remedy in that circumstance, the *Lakoski* issues and holding would have been utterly inapplicable to that case.

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456 U.S. 518, 102 S.Ct. 916. That position, of course, goes far beyond what the respondent has argued or the Fifth Circuit held in the present case.

In *Preston v. Commonwealth of Virginia ex rel New River Community College*, 31 F.3d 203, 205 (4th Cir. 1994), the plaintiff sued under *both* Title VII and Title IX, which alone is enough to distinguish that suit from Lakoski's. case. The holding that Title VII provides the exclusive federal statutory damages remedy for sex discrimination in employment would be at most dictum for *Preston* because it would not alter the outcome. That is, the plaintiff would still be free to pursue the same relief under Title VII as she sought under Title IX.

Of the three decisions cited by the petitioner, *Preston* most closely approaches a genuine conflict with *Lakoski*, concluding that Title IX's "implied right [of action] extends to employment discrimination on the basis of gender by education institutions receiving federal funds." 31 F.3d 206. However, although a footnote makes apparent the Fourth Circuit's view that the implied right of action includes a claim for damages even for employment discrimination, *id.* at 205 n. 1, because of the trial results *Preston's* Title IX holding is limited entirely to the context of the plaintiff's claim for injunctive and declaratory relief. In *Lakoski*, the Fifth Circuit left open the question of whether the exclusivity of the Title VII damages remedy for employment discrimination would preclude a Title IX employment claim solely for declaratory or injunctive relief. 66 F.2d at 753; App. at 5.

In *Preston*, the trial court presented the same liability question to the jury for purposes of both the Title VII and the Title IX claims. 31 F.3d 205. After the jury found for the defendant on the undifferentiated liability issue, the plaintiff nevertheless apparently petitioned the trial court (in its equity capacity) for injunctive and declaratory relief under Title IX, which the court denied. *Id.* Holding that the elements of a Title IX retaliation claim are the same as for a Title VII retaliation claim, the Fourth Circuit affirmed the denial of Title IX relief. *Id.* at 206-208.

Thus, the bottom line in *Preston* would be the same with or without the separate Title IX employment claim. The case would be tried on the same issues for the same relief, with the same result.

The Fifth Circuit's *Lakoski* decision likewise would not have altered the outcome in *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988). That case was not a pure employment discrimination action. Instead, as a participant in a medical school's surgical residency program, the plaintiff was a hybrid between a student and employee. 864 F.2d 884, 897. That is, an integral element of a medical resident's training program is his or her employment as a physician on the staff of a hospital. 864 F.2d 886. Dismissal from the medical school results in termination from the hospital and vice-versa. *Id.* at 890-892. All of the original defendants in *Lipsett* were affiliated with the medical school, of whom one, the Director of Training at the San Juan V.A. Hospital, was also an official of the employing hospital. 864 F.2d 884-885 & nn. 1, 5.

Because Lakoski was unquestionably an employee and not a student, the Fifth Circuit decision in this case would not apply directly to the *Lipsett* facts. It is premature at best to speculate whether the *Lakoski* reasoning could be stretched so far as to make Title VII the exclusive damages remedy for the discriminatory dismissal of a medical resident. Thus far, neither the Fifth Circuit, nor any other court the respondent is aware of, has done so.[4]

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[4] Interestingly, the First Circuit in *Lipsett* relied on *Mabry v. State Bd. of Community Colleges & Occupational Educ.*, 813 F.2d 311 (10th Cir.), *cert. denied*, 484 U.S. 849, 108 S.Ct. 148 (1987). Like Preston but unlike Lakoski, Mabry sued under both Title VII and Title IX. 813 F.2d 313. The decision provides no indication that the defendants contested Mabry's right to bring an employment-related damages claim under Title IX. The *Mabry* holding, that an earlier Title VII judgment precluded Title IX relief by collateral estoppel, would not have been materially altered by the *Lakoski* holding.

B. The *Lakoski* Issue Has Not Received A Full Airing In The Courts Below.

As shown in the preceding section, except for dictum in *Preston*, the Fifth Circuit's *Lakoski* decision is the only case in which a court of appeals has squarely addressed the issue of whether a plaintiff, in addition to or instead of Title VII, may sue under Title IX for damages for employment-related sex discrimination. Even if the cases cited by Lakoski represented genuine conflicts -- which, as shown, they do not -- it would mean that only four of the twelve regional circuits have examined the issue.

Consequently, the issue raised by the Fifth Circuit decision in this case has not "percolated" sufficiently among the circuits to merit Supreme Court review at this time.

IV. The Fifth Circuit Decision In This Case Does Not Conflict With Public Policy

Finally, Lakoski argues in her petition at 8-10 that the Fifth Circuit's decision somehow runs afoul of two post-Title IX Congressional enactments, the Civil Rights Remedies Equalization Amendment of 1986, 42 U.S.C. § 2000d-7, and the Civil Rights Act of 1991. Of course, neither of the latter statutes purports to interpret the intent of the 1972 Education Amendments, which simultaneously created Title IX and extended Title VII remedies to educational employees. Even if they did, this Court has "observed on more than one occasion that the interpretation given by one Congress . . . to an earlier statute is of little assistance in discerning the meaning of that statute." *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 168, 109 S.Ct. 2854, 2862 (1989).

Section 2000d-7 abrogated Eleventh Amendment immunity to a Title IX suit. The Fifth Circuit's *Lakoski* decision does nothing to attempt to restore that immunity. Lakoski points to language in § 2000d-7 that the same remedies are available

against state defendants in Title IX actions as against private defendants. Pet. at 9. That, of course, begs the question of whether damages for sex discrimination in employment is one of the remedies available against any Title IX defendant, public or private. The statute does not foreclose the Fifth Circuit's answer.

The Fifth Circuit decision in this case is not merely consistent with the policy manifest in the Civil Rights Act of 1991; it fulfills it. The 1991 act represents a reaffirmation of the emphasis placed by Congress on Title VII as the comprehensive federal remedial scheme for employment discrimination. To the extent that plaintiffs might have found Title VII remedies (previously limited to backpay and reinstatement) wanting, so as to inspire searches for alternative employment remedies, the Civil Rights Act of 1991 responded with the addition of 42 U.S.C. § 1981a.

The 1991 Civil Rights Act's and this Court's recognition of a parallel remedy for *racial* discrimination in employment, Pet. at 4-5, 9, is inapposite. The Civil Rights Act of 1866, 42 U.S.C. § 1981, has roots going back to the abolition of slavery after the Civil War. *See, Runyon v. McCrary*, 427 U.S. 160, 168-169 n. 8, 96 S.Ct. 2586, 2593-2594 n. 8 (1976). Congressional efforts to combat sex discrimination in either employment or education have no such history. Unlike § 1981, Title IX did not pre-date Title VII.

Lakoski's argument in this section of her petition inadvertently illuminates what is really at issue in this case and why this Court should not grant review. In her petition at 8, Lakoski complains that, "In 1995 the E.E.O.C. reported a backlog of some 100,000 charges nationwide, as a consequence of which claimants faced long delays in the investigation of their complaints."[5] The true basis for Lakoski's position in this

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[5] Lakoski goes on to claim that, "faced with serious harm to her career," she bypassed Title VII in order to "sue[ ] under a law which did not require

lawsuit is dissatisfaction with the operation of Title VII in actual practice. However, the remedy for that perceived deficiency is not through this Court. If Title VII is truly not functioning as it was intended, that is a concern more properly addressed to Congress. Titles VII and IX are both statutory measures and should be repaired (if repair is needed) through the legislative process.[6] It is not appropriate to call upon the judiciary to compensate for the perceived inadequacy of one statute by stretching another statute beyond its intended boundaries. In the Civil Rights Act of 1991, Congress demonstrated that when it believes Title VII needs fixing, it is capable of acting.

CONCLUSION

Accordingly, respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

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the delay of administrative processing." Pet. at 9. However, the record shows that after being notified in February of 1991 that her tenure was denied and that 1991-92 would be her terminal year, Lakoski waited until August of 1992 to file suit under Title IX. In that year and a half, Lakoski could have sued under Title VII. Within 180 days of filing a charge of discrimination, if the EEOC has not acted the complainant is entitled to obtain a notice of right to sue, which then entitles her to file suit under Title VII. 42 U.S.C. § 2000e-5 (f) (1).

[6] For example, the alleged backlog of EEOC cases is a matter for the budget and appropriations process.

Respectfully submitted,

DAN MORALES
Attorney General of Texas

JORGE VEGA
First Assistant Attorney General

LAQUITA A. HAMILTON
Deputy Attorney General

TONI HUNTER
Chief, General Litigation Division

JAMES C. TODD
Assistant Attorney General
General Litigation Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2120

Counsel for Respondent

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No. 95-1439

In the Supreme Court of the United States

OCTOBER TERM, 1995

JOAN M. LAKOSKI, PETITIONER

v.

UNIVERSITY OF TEXAS MEDICAL BRANCH AT GALVESTON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WALTER DELLINGER
Acting Solicitor General
DEVAL L. PATRICK
Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
BETH S. BRINKMANN
Assistant to the Solicitor General
DENNIS J. DIMSEY
MARIE K. MCELDERRY
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

21 pp

QUESTION PRESENTED

Whether a private suit for damages for employment discrimination under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, is precluded by Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*

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No. 95-1439

JOAN M. LAKOSKI, PETITIONER

v.

UNIVERSITY OF TEXAS MEDICAL BRANCH AT GALVESTON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

Petitioner, Dr. Joan M. Lakoski, a female university professor, brought this suit against the University of Texas Medical Branch at Galveston (respondent) and certain university officials, alleging that they had intentionally discriminated against her on the basis of sex when they denied her tenure, in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, 42 U.S.C. 1983, and state tort law. The district court denied respondent's request that the case be dismissed on

the ground that there was no implied private right of action under Title IX for employment discrimination. Pet. App. 3b.[1] The case proceeded to trial, the jury returned a verdict and damages award for petitioner, and, after ordering petitioner to remit a portion of the damages, the district court entered judgment for petitioner. *Id.* at 1a-2a. The court of appeals reversed and rendered judgment for respondent. *Id.* at 1b-17b.

1. Petitioner joined respondent's faculty in 1984 as a tenure-track assistant professor in the Department of Pharmacology. Pet. App. 2b. She sought and was denied promotion three different times, once each in 1988, 1989, and 1990. *Ibid.* In 1991, the department's tenure committee recommended that petitioner not be considered for tenure in the future. *Ibid.* Respondent offered petitioner another position with a higher salary, which she rejected. *Ibid.* Petitioner was later informed by the department chairman that her 1991-1992 appointment would be her last at respondent University. *Ibid.*

Petitioner filed suit against respondent and three university officials. She alleged that the denial of tenure and her termination constituted intentional sex discrimination in violation of Title IX, as well as 42 U.S.C. 1983 and state tort law; she sought reinstatement and compensatory and punitive damages. Pet. App. 3b; Resp. C.A. Br. 4. In conjunction with her complaint, petitioner requested that respondent be preliminarily enjoined from terminating her. Pet. App. 3b. Respondent agreed to

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[1] Because the documents in the petition appendix are each paginated separately, we cite the pages of the first document followed by an "a", the pages of the second document followed by a "b," and the pages of the third document followed by a "c."

retain petitioner on its faculty pending the outcome of the trial. *Ibid.*[2]

Respondent filed a motion to dismiss, arguing, *inter alia*, that there is no implied private right of action under Title IX for damages for employment discrimination. Pet. App. 3b. Adopting the recommendation of a magistrate judge, the district court denied the motion to dismiss on that ground. *Ibid.*[3] The case proceeded to trial and the jury returned a verdict for petitioner and awarded her $250,000 in damages. *Id.* at 4b.[4] The district court ordered petitioner to remit a portion of the damages award, entered a judgment of $150,000, and awarded attorneys' fees. *Ibid.*

2. The court of appeals reversed. Pet. App. 1b-17b. The court rendered judgment for respondent on petitioner's Title IX claim, holding that Title VII of the Civil

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[2] Petitioner initially joined with another female faculty member in filing suit, but she later proceeded on her own. Pet. 2. Petitioner ultimately accepted a tenure-track position at Pennsylvania State University. Pet. App. 3b.

[3] The court dismissed the Section 1983 claims, to the extent they could be construed as having been brought against respondent, based on the State's Eleventh Amendment immunity. Pet. App. 3b. With regard to the individual defendants, the district court denied their motion to dismiss based on qualified immunity, *ibid.*, but, at the close of petitioner's case at trial, the district court dismissed all the claims against the individual defendants. *Id.* at 4b.

[4] The court of appeals explained that two claims were submitted to the jury as a joint claim—the Title IX claim as well as a Section 1983 claim based upon Title IX. Pet. App. 4b. As the court of appeals notes, the nature of the Section 1983 claim submitted is not entirely clear because the district court earlier had dismissed the Section 1983 claims against respondent (see note 3, *supra*), although without distinguishing between a Section 1983 claim based upon the Fourteenth Amendment and a Section 1983 claim based upon Title IX. See Pet. App. 3b-4b.

Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, "provides the exclusive remedy for individuals alleging employment discrimination on the basis of sex in federally funded educational institutions." Pet. App. 5b. The court noted that petitioner had a colorable claim of employment discrimination in violation of Title VII, but had not pursued that claim and had not filed a charge with the Equal Employment Opportunity Commission as required prior to bringing a Title VII court action. *Id.* at 3b. The court concluded that permitting an implied private right of action for damages under Title IX for employment discrimination would disrupt the remedial scheme for redressing employment discrimination by educational institutions, *id.* at 6b, and that Congress did not intend that Title IX "offer a bypass of the remedial process of Title VII," *id.* at 5b.[5]

a. The court rejected petitioner's claim that this Court's rulings in *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512 (1982), and *Franklin* v. *Gwinnett County Pub. Schs.*, 503 U.S. 60 (1992), compel a conclusion that there is an implied right of action under Title IX for money damages in a private employment discrimination suit against an educational institution receiving federal funds. The court purported to distinguish *Cannon* and *Franklin* because they involved suits by students rather than by employees, and *North Haven* because that case arose out of a challenge to administrative regulations rather than a claim by an individual for money damages. Pet. App. 6b.

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[5] The court stated that its holding is limited to "individuals seeking money damages under Title IX directly or derivatively through § 1983 for employment practices for which Title VII provides a remedy," and expressed no opinion on whether Title VII "excludes suits seeking only declaratory or injunctive relief." Pet. App. 5b.

b. The court of appeals also held that, to the extent the record indicated that the district court had submitted to the jury a Section 1983 action against respondent based on Title IX (see note 4, *supra*), the district court erred. Pet. App. 7b. The court held that Congress intended that Title VII's comprehensive remedial scheme "exclude a damage remedy under Title IX for individuals alleging employment discrimination," *id.* at 9b, both directly under Title IX and indirectly through Section 1983. See Pet. App. 8b-17b, relying on *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981).

The court of appeals viewed the instant case as comparable to *Great American Federal Savings & Loan Ass'n* v. *Novotny*, 442 U.S. 366, 378 (1979), where the Court held that a violation of Title VII could not be pursued through 42 U.S.C. 1985(e) because such a suit would bypass the Title VII administrative process. Pet. App. 9b. The court also relied on *Brown* v. *General Services Admin.*, 425 U.S. 820, 835 (1976), in which the Court held that Title VII provides the exclusive judicial remedy for federal employees' employment discrimination claims. Pet. App. 9b. Based on these decisions, the court of appeals earlier had held that a Title VII claim could not be the basis for an action under Section 1983. Pet. App. 9b-10b, citing *Irby* v. *Sullivan*, 737 F.2d 1418, 1428 (5th Cir. 1984); *Johnston* v. *Harris County Flood Control Dist.*, 869 F.2d 1565, 1574 (5th Cir. 1989), cert. denied, 493 U.S. 1019 (1990).

The court of appeals recognized that, according to the House Report accompanying the 1972 amendment to extend Title VII to state and local government employees, Title VII was not intended to preempt Section 1983 claims. Rather, Title VII "was envisioned as an independent statutory authority meant to provide an ag-

grieved individual with an additional remedy to redress employment discrimination." Pet. App. 10b. The court concluded that this statement did not have any relevance to Title IX remedies, however, because the House Report also stated that Title VII was not meant to affect "*existing* rights that [state and local government employees] have already been granted by previous legislation" (emphasis added), and Title IX did not yet *exist* at the time of that Title VII amendment. *Id.* at 11b-12b. The court reasoned that when Congress enacted Title IX a few months later, it did not intend to create a bypass of Title VII administrative procedures. *Id.* at 12b.

The court of appeals concluded that the legislative history of Title IX demonstrated that the right to be free from sex discrimination created by Title IX is "no different from the Title VII right." Pet. App. 13b. The court pointed out that Title VII originally exempted educational institutions from its coverage and that, as initially introduced, the bill that later included Title IX also contained a provision to amend Title VII to remove that exemption. *Ibid.*, citing H.R. 7248, 92d Cong., 1st Sess. § 1006 (1971). Congress, however, removed the Title VII exemption before enactment of Title IX and the final bill that included Title IX omitted the provision amending Title VII. Pet. App. 14b. The court of appeals reasoned that this reflected a congressional intent to create one right and two remedies for employment discrimination, *i.e.*, a remedy for individuals through Title VII and a remedy for federal funding agencies through Title IX. *Id.* at 14b-15b.[6] The court concluded that "[g]iven this

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[6] The court read Title IX administrative regulations and case law to support its interpretation that the prohibitions against sex discrimination in Title IX and Title VII are the same because the regulations and case law direct agencies and courts to look to Title VII law when

compelling evidence that Title IX prohibits the same employment practices proscribed by Title VII, we hold that individuals seeking money damages for employment discrimination on the basis of sex in federally funded educational institutions may not assert Title IX either directly or derivatively through § 1983." *Id.* at 16b-17b.[7]

DISCUSSION

1. a. The decision of the court of appeals is incorrect[8] and conflicts with this Court's decisions regarding liability and remedies under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, which prohibits sex discrimination by educational institutions that receive federal financial assistance. According to the court of appeals, if a person who has been subjected to employment discrimination in violation of Title IX could have brought an action for employment discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, that person is precluded from filing a private cause of action for damages under Title IX.

That ruling cannot be reconciled with the rationale underlying the Court's decision in *Franklin* v. *Gwinnett*

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deciding whether a Title IX violation has occurred. Pet. App. 15b-16b. The court discounted administrative regulations that state that the obligations imposed by Title IX are "independent of, and do not alter" obligations not to discriminate under Title VII because, in the court's view, that statement is merely an indication that an administrative finding of discrimination under Title VII is not a prerequisite to such a finding under Title IX. *Id.* at 15b n.4.

[7] The court of appeals dismissed as moot petitioner's cross-appeal concerning the remittitur of damages and the attorneys' fees award. Pet. App. 2b, 17b. The court denied a petition for rehearing and a suggestion for rehearing en banc. *Id.* at 1c-2c.

[8] Petitioner has not sought this Court's review of any question regarding Section 1983, and this brief does not analyze the court of appeals' rulings on that issue. See Pet. i, 3-10.

County Public Schs, 503 U.S. 60, 76 (1992), and the Court's antecedent decisions in *Cannon* v. *University of Chicago*, 441 U.S. 677, 703 (1979), and *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 531 (1982). In *Cannon*, the Court held that individuals can bring private causes of action against educational institutions to remedy sex discrimination in violation of Title IX. In *North Haven*, the Court held that claims of employment discrimination based on sex are cognizable under Title IX. In *Franklin*, the Court held that damages are available in private causes of action under Title IX to redress intentional violations of the statute. Petitioner is correct (Pet. 3-4) that these rulings lead inexorably to the conclusion that an employee who is a victim of intentional discrimination based upon sex by a federally funded education program or activity has a private right of action to seek damages under Title IX, *i.e.*, employees are among the persons protected by Title IX (*North Haven*) who have a private right of action (*Cannon*) that includes a damages remedy for intentional discrimination (*Franklin*).

Without any analysis of the reasoning underlying those opinions, however, the court of appeals rejected that conclusion and held, in essence, that the damages remedy recognized in *Franklin* is limited to cases in which the Title IX plaintiff is a student. But, this Court implied no such limitation in *Franklin*—quite the opposite.

In *Franklin*, the Court applied the "longstanding rule" that "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." 503 U.S. at 66, 70-71. The Court found that "the same contextual approach" toward determining congressional intent that was used by the Court in *Cannon* "to justify an implied right of action more than amply demonstrates the lack of any legislative

intent to abandon the traditional presumption in favor of all available remedies." *Id.* at 72. After reviewing subsequent legislative developments, the Court concluded that it could not say "that Congress has limited the remedies available to a complainant in a suit brought under Title IX." *Id.* at 73.[9]

Nothing in *Franklin* supports a different conclusion with regard to damages for one subgroup of Title IX plaintiffs—employment discrimination victims. To the contrary, the Court's reasoning in *Franklin* strongly suggests that employment cases are no different in this respect from the student's case that was before it. First, the Court expressly relied on *Guardians Ass'n* v. *Civil Service Comm'n of the City of New York*, 463 U.S. 582 (1983), to support its application of the traditional presumption that a federal court may order any appropriate relief where Congress is silent on the question of remedies. The Court pointed out that, in *Guardians*, "a clear majority [of the Court] expressed the view that damages were available under Title VI [of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*] in an action seeking remedies for an intentional violation" of that statute. 503 U.S. at 70. *Guardians* involved an employment discrimination claim brought through an implied cause of action under the statute upon which Title IX

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[9] The *Franklin* Court concluded that Congress's subsequent amendment to Title IX to abrogate the States' Eleventh Amendment immunity against legal and equitable remedies, see Civil Rights Remedies Equalization Amendment of 1986, 42 U.S.C. 2000d-7, validated the award of damages under Title IX, as did enactment of the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988), which again expanded the scope of Title IX without any effort to restrict the cause of action recognized in *Cannon* or to alter the traditional presumption in favor of all appropriate relief. 503 U.S. at 72-73.

was patterned, Title VI.[10] Because of the similarities between Title VI and Title IX, it is apparent that "Congress intended similar remedies to be available under Title IX." *Guardians*, 463 U.S. at 594 (opinion of White, J., joined by then-Justice Rehnquist).[11] Thus, in light of *Guardians*, damages for employment cases should be available under Title IX as they are under Title VI.

Second, the *Franklin* Court expressly addressed, and rejected, the argument that Title IX remedies should be limited to backpay and prospective relief. The Court noted that the adequacy of legal remedies should first be determined before resorting to equitable remedies. See 503 U.S. at 75-76. If, as the court of appeals here reasoned, employment complaints seeking damages were not covered by the ruling in *Franklin*, the question of the availability of backpay as a remedy would have been irrelevant. See *id.* at 76 (Court recognized that in *Franklin*, itself, the question of the availability of backpay was irrelevant because plaintiff was a student).

The Court's opinion in *North Haven* also evidences that the Court already has considered, and rejected, the

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[10] Title VI prohibits discrimination based on race, color, or national origin, and applies not only to educational institutions that receive federal funds, but to all programs or activities receiving federal financial assistance. 42 U.S.C. 2000d. With regard to employment discrimination, however, Title VI applies only "where a primary objective of the Federal financial assistance is to provide employment." 42 U.S.C. 2000d-3. Congress rejected a proposed amendment that would have limited Title IX in a similar manner. See page 13, *infra*.

[11] Determination of what remedies are available under Title VI also determines what remedies are available under Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination based on handicap by any program or activity that receives federal financial assistance. See 29 U.S.C. 794a and 794a(a)(2) (making available to Section 504 plaintiffs the "remedies, procedures, and rights set forth in title VI").

essence of the reasoning of the court of appeals below. The Court expressly rejected the contention that the availability of other adequate remedies to redress employment discrimination affects the availability of remedies under Title IX. *North Haven*, 456 U.S. at 535 n.26. The Court explained that "even if alternative remedies are available and their existence is relevant, this Court repeatedly has recognized that Congress has provided a variety of remedies, at times overlapping, to eradicate employment discrimination." *Ibid.*, citing *Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229, 236-239 (1976) (availability of Title VII remedy does not preclude grievance procedure under a collective bargaining agreement); *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 459 (1975) (availability of Title VII remedy does not preclude action under 42 U.S.C. 1981); and *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47-49 (1974) (availability of contractual rights under a collective bargaining agreement does not preclude Title VII remedy).[12]

The *North Haven* Court also analyzed the same legislative history relied upon by the court of appeals below (see Pet. App. 13b-15b), regarding enactment of Title IX. The *North Haven* Court gave no indication that it viewed Title IX, as the court of appeals did, as merely a means "to bolster the enforcement of the pre-existing Title VII prohibition of sex discrimination in federally funded educational institutions" (Pet. App. 15b). See 456

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[12] In *Cannon*, the Court already had indicated that individual actions were authorized under Title IX to remedy employment discrimination. See *Cannon*, 441 U.S. at 708 n.42 (discussing, *inter alia*, fact that private causes of action would be effective in areas where administrative resources were lacking and noting that most administrative "complaints involv[ed] sex discrimination in higher education academic employment").

U.S. at 523-531. To the contrary, the Court discussed, in detail, the circumstances surrounding the Senate floor amendment that added Title IX, *inter alia*, to the legislation. The *North Haven* Court emphasized that Title IX's Senate sponsor described Title IX as the "*heart*" of his amendment and clearly intended that "employees as well as students be protected" by that provision, without any suggestion that employees would have to seek relief via different means than students. *Id.* at 524, 525.

In addition, like the court below, the *North Haven* Court noted that the amendment also initially included a provision to remove from Title VII the exemption for schools and educational employees, but ultimately omitted that provision because of the intervening enactment of such an amendment to Title VII through other legislation. 456 U.S. at 524-530 & n.18; see Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(1), 86 Stat. 103, amending 42 U.S.C. 2000e(a).[13] The Court did not, however, give any indication that it viewed the matter, as the court of appeals did (Pet. App. 14b), as evidencing that Congress enacted Title IX simply to provide a second remedy for a Title VII violation. Rather, the Court expressly concluded that Title IX, "as well as the Title VII * * * provisions, was aimed at discrimination in employment." *North Haven*, 456 U.S. at 524. The Court also quoted the sponsor's statement that Title IX dealt with discrimination in admission, services, and "employment, * * * as a member of a faculty or whatever" and that, "[i]n the area of employment, we

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[13] The legislative history of the Equal Employment Opportunity Act of 1972 provides additional evidence that Congress did not intend Title VII to preempt Title IX actions by employees. Cf. *Keller* v. *Prince George's County*, 827 F.2d 952, 958-961 (4th Cir. 1987); *Beardsley* v. *Webb*, 30 F.3d 524, 526-527 (4th Cir. 1994).

permit no exceptions." *Id.* at 526, quoting 118 Cong. Rec. 5812 (1972) (emphasis omitted).

Finally, the *North Haven* Court discussed the House bill, cited by the court below (Pet. App. 13b-14b), and explained that it contained a provision that would have limited the ability of funding agencies to take action under Title IX, with regard to an employment practice of a recipient, to cases "where a primary objective of the Federal financial assistance is to provide employment." 456 U.S. at 527. The Court pointed out that, in the conference committee, however, the House receded, and Title IX was enacted without the restriction. *Id.* at 528. Thus, the Court made clear that, although Congress was specifically presented with an opportunity to adjust Title IX to eliminate, or even limit, its overlap with Title VII, Congress chose not to do so.[14]

There is thus no valid basis for the court of appeals' interpretation of the legislative history of Title IX as evidencing a congressional intent to treat victims of discrimination under Title IX differently depending on whether they are employees or students, or to require employees seeking redress for violations of Title IX to pursue different avenues for relief than students. And, in any event, the legislative history cannot possibly be read to evidence a congressional intent that employees who seek damages under Title IX must proceed under Title VII to obtain such a remedy because, at that time, Title VII did not authorize damages. It was not until 19 years later that Congress enacted the Civil Rights Act of 1991

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[14] See also *North Haven*, 456 U.S. at 530-535 (discussing postenactment history of Title IX, including administrative regulations that were reviewed and not disapproved by Congress that support same interpretation, as well as legislative proposals to limit applicability of Title IX with regard to employment which were not enacted).

that authorizes awards of compensatory and punitive damages in certain Title VII cases involving intentional discrimination. See Civil Rights Act of 1991, Pub. L. No. 166, § 102, 105 Stat. 1072; 42 U.S.C. 1981a.[15]

b. Although respondent asserts (Br. in Opp. 9-11) that no other court of appeals' ruling is "directly" contrary to the holding below, other courts of appeals have recognized that Title VII does not preempt Title IX remedies.[16] Respondent concedes that the Fourth Circuit, in *Preston* v. *Commonwealth of Virginia ex rel. New River Community College*, 31 F.3d 203, 205-206 & n.1. (1994), held that "Title IX's 'implied right [of action] extends to employment discrimination on the basis of gender by education institutions receiving federal funds,'" and that it was even apparent from the opinion that the court's view was that an employment discrimination victim's right under Title IX included damages. Resp. Br. in Opp. 10, quoting *Preston*, 31 F.2d at 206. The First Circuit, in *Lipsett* v. *University of Puerto Rico*, 864 F.2d 881 (1988), similarly indicated that it does not view Title IX remedies in employment discrimination cases to be precluded by Title VII. Specifically, the court held that a

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[15] The Civil Rights Act of 1991 also illustrates that, when Congress intends to preempt the award of damages under one statute by another statute, it does so expressly. In authorizing the award of damages under Title VII in certain cases, Congress expressly stated that such an award is available "provided that the complaining party cannot recover under section 1981 of this title." 42 U.S.C. 1981a(a)(1).

[16] Earlier opinions of the Fifth Circuit, in fact, appeared to assume that Title VII did not preempt Title IX employment discrimination suits. See, *e.g.*, *Chance* v. *Rice Univ.*, 984 F.2d 151 (1993), supplemented on reh'g, 989 F.2d 179 (1993) (affirming, on the merits, a verdict against a Title IX employment discrimination plaintiff, applying both Title VI and Title VII substantive standards, without mentioning any preclusive effect of Title VII).

medical resident had presented sufficient facts to survive summary judgment on her Title IX claim alleging that she had been subjected to sex discrimination in a medical school's surgery residence program. Although the court did not address the question of damages, it indicated that the plaintiff would be entitled to the same remedies under her implied cause of action as other Title IX plaintiffs. The *Lipsett* court expressly held that the Title VII standard for proving discrimination "should apply to claims of sex discrimination arising under Title IX * * * [in] the context of employment discrimination," including the "mixed employment-training context" before it. *Id.* at 897.[17]

The court of appeals cited only one district court case in support of its ruling. Pet. App. 7b n.1, citing *Howard*

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[17] Cf. *Mabry* v. *State Board of Community Colleges & Occupational Educ.*, 813 F.2d 311, 314 n.4 (10th Cir.) (holding Title IX action for employment-related damages barred by the collateral estoppel effect of an earlier Title VII judgment, but noting that it did not reach question whether Title VII preempts Title IX claims), cert. denied, 484 U.S. 849 (1987); *O'Connor* v. *Peru State College*, 781 F.2d 632, 639-643 & n.8 (8th Cir. 1986) (recognizing cause of action under Title IX for employment discrimination and discriminatory employment conditions apart from cause of action under Title VII, but rejecting claims on merits in light of earlier Title VII decision in favor of defendant and because Title IX coverage did not extend to plaintiff's program).

The Seventh Circuit recently took yet a different tack. It held that Title IX provides a private right of action and extensive remedies, including damages, to employment discrimination victims. *Waid* v. *Merrill Area Pub. Schs.*, 91 F.3d 857, 861-863 (1996). The court also held, however, that Title IX preempted the plaintiff's claims under Section 1983, *id.* at 863, that any of her claims for equitable relief under either of those statutes was preempted by Title VII (pre-1991 version), *id.* at 862, and that the plaintiff's successful pursuit of her claim under state law in administrative proceedings "effectively satisfied any claims she might have had under Title VII," *ibid.* The plaintiff's Title IX claim for damages was remanded for further proceedings. *Id.* at 867.

v. *Board of Educ. of Sycamore Community Unit Sch. Dist. No. 427*, 893 F. Supp. 808, 815 (N.D. Ill. 1995). In fact, there is disagreement in the district courts on the issue. In *Howard*, the court held that a Title IX cause of action based on sex discrimination that seeks remedies afforded by Title VII is precluded by Title VII. 893 F. Supp. at 815. The *Howard* court followed the rulings by two other district courts, one that is also in the Seventh Circuit and the other in the Sixth Circuit. *I.e.*, *Storey* v. *Board of Regents*, 604 F. Supp. 1200 (W.D. Wis. 1985) (same); *Wedding* v. *University of Toledo*, 862 F. Supp. 201 (N.D. Ohio 1994) (same). The latter case was recently overruled by the Sixth Circuit, however, in an unpublished decision, *Ivan* v. *Kent State Univ.*, 92 F.3d 1185 (Table), 1996 WL 422496, *2 n.10 (July 26, 1996) (in ruling that Title VII standards should be applied for determining claims of gender discrimination in employment under Title IX, court expressly "overrules the conclusion reached by the district court in *Wedding* * * * that Title VII preempts an individual's private remedy under Title IX"). Other district courts have held (correctly in our view) that "a private right of action for employment discrimination exists under Title IX separate and apart from Title VII and without regard to the availability of the Title VII remedy." *Henschke* v. *New York Hospital-Cornell Medical Ctr.*, 821 F.Supp. 166, 172 (S.D.N.Y. 1993) (relying on *Cannon*, *North Haven*, and *Franklin*, and legislative history, and concluding that "the Supreme Court and Second Circuit interpretations of the statute do not permit" a contrary conclusion); see also *Haynes* v. *Glen Mills Schs.*, 59 Fair Empl. Prac. Cas. (BNA) 566 (E.D. Pa. 1992) (relying on *North Haven* and *Franklin* and also pointing out that, prior to 1991, remedies available under the two statutes were different); *Broussard* v. *Board of Trustees for State Col-*

leges & Universities, 61 Fair Empl. Prac. Cas. (BNA) 710 (E.D. La. 1993) (distinguishing *Storey* as having been decided before the express abrogation of the States' Eleventh Amendment immunity under Title IX and the Court's decision in *Franklin* in which the Court gave no indication that employment claims were to be treated differently from claims by students for purposes of remedies under Title IX).

2. The court of appeals' reliance on *Great American Federal Savings & Loan Ass'n* v. *Novotny*, 442 U.S. 366, 378 (1979), and *Brown* v. *General Services Admin.*, 425 U.S. 820, 835 (1976), is misplaced.

In *Novotny*, the Court held that deprivation of a right created by Title VII cannot be the basis for a cause of action under 42 U.S.C. 1985(3).[18] The Court explained that "Section 1985(3) provides no substantive rights itself; it merely provides a remedy for violation of the rights it designates." *Novotny*, 442 U.S. at 372. Therefore, the only substantive statutory right asserted by the plaintiff in *Novotny* was his right under Title VII and, in light of the administrative process and limitations on remedies Congress established in Title VII, the Court held that such a right could be enforced only through a cause of action under Title VII. The Court explained that its ruling was not inconsistent with *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975), in which the Court had held that Title VII did not preclude a separate cause of action to enforce substantive rights created by Section 1981. The Court pointed to similar cases, in which it had held that substantive rights that were

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[18] Section 1985(3) provides a cause of action for damages to persons who are injured as a result of a conspiracy to deprive them of equal protection of, or equal privileges and immunities under, the law. See 42 U.S.C. 1985(3).

conferred by earlier civil rights statutes were not withdrawn by the subsequent passage of modern civil rights laws, and emphasized that *Johnson* and the other cases presented a different issue because they involved two "independent" rights, whereas *Novotny* involved only a Title VII right. *Novotny*, 442 U.S. at 377-378.

Petitioner's case is controlled by *Johnson* and similar cases involving two independent rights, not by *Novotny*. Petitioner's Title IX cause of action seeks to enforce petitioner's right under Title IX, not her right under Title VII. The Court made clear in *Cannon* that "Title IX explicitly confers a benefit on persons discriminated against on the basis of sex" by federally funded education programs. 441 U.S. at 694. Petitioner's claim alleging employment discrimination by respondent, as proven at trial, establishes that she is such a person. *North Haven*, 456 U.S. at 520-530. Petitioner's deprivation of a right created by Title IX was a proper basis for a cause of action for damages directly under Title IX. *Cannon*, 441 U.S. at 717.

The court of appeals' reliance on *Brown* should be rejected on similar grounds. In *Brown*, the Court held that the provision added to Title VII in 1972, establishing the right of federal employees to file a statutory suit for employment discrimination (42 U.S.C. 2000e-16), was intended by Congress to constitute the exclusive judicial remedy against the federal government for employment discrimination. *Brown*, 425 U.S. at 835. The Court concluded that Congress had enacted the legislation because there was no other effective judicial remedy for federal employees, in part because such employees could not overcome the federal government's sovereign immunity defense against such claims. *Id.* at 825-828. The Court found that the "unambiguous congressional perception seems to indicate that congressional intent in 1972 was to

create an exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination." *Id.* at 828-829. The structure of the 1972 amendment, which established a special administrative and judicial enforcement system for federal employees that involved the Civil Service Commission, confirmed the Court's conclusion. *Id.* at 829-832 & n.11. The Court distinguished its ruling in *Johnson*, *supra*, that Title VII did not preclude a Section 1981 suit, because the *Johnson* case involved *private* employment and it relied on a congressional intent to preserve two causes of action, whereas the congressional intent with regard to federal employees was to create one exclusive remedial scheme. *Brown*, 425 U.S. at 833.

Again, petitioner's case is controlled by *Johnson*, not by *Brown*. Petitioner's case does not involve the unique circumstances presented by federal sovereign immunity and, as discussed above, the legislative history of both Title IX and Title VII support the conclusion that Congress did not intend Title VII to preclude employment discrimination claims under Title IX.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
DEVAL L. PATRICK
Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
BETH S. BRINKMANN
Assistant to the Solicitor General
DENNIS J. DIMSEY
MARIE K. MCELDERRY
Attorneys

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APPENDIX

1. Title IX of the Education Amendments of 1972, as codified at 20 U.S.C. 1681, provides, in relevant part:

§ 1681. Sex

(a) Prohibition against discrimination; exceptions

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance * * *.

20 U.S.C. 1681(a).

2. Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, provides, in relevant part:

§ 2000e. Definitions

For the purposes of this subchapter--

* * * * *

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year * * *.

42 U.S.C. 2000e(b).

§ 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any

> individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin * * *.

42 U.S.C. 2000e-2(a).